Mullin, 5 *H. & J.* 190; *Cunningham* v. *Cunningham*, *Cas. Conf. North Carol.* 353; *Walker* v. *Bostick*, 4 *Desau.* 266.

Where a man by his writing obligatory under seal bound himself and his heirs for the payment of a sum of money and died, leaving an estate in lands which descended to his heir; the creditor, on obtaining judgment upon his obligation against the heir, might, by the common law, not by any statute, take in execution all the lands which descended to the heir, although he could not have had execution of any part of them against the ancestor himself. This ensued as a necessary consequence of allowing the ancestor to bind his heir as well as himself for the payment of a debt. For, having given an action against the heir, the creditor could have had no fruit of his action unless the lands descended could be taken in execution; because the goods and chattels of the deceased belong to his executor or administrator, and the lands only descend to the heir; and neither of them could be charged further than to the amount of the assets which came to his hands. But if the obligee sues and obtains judgment against the obligor, in his life-time, the debt is placed upon a new and a different foundation; and the claim becomes extinct as a debt resting upon a security by which the heir is bound. The judgment extinguishes it as a bond debt, and discharges the heir. And therefore, a bond creditor who has thus obtained judgment cannot after the death of the ancestor, by a *scire facias*, or in any other manner charge the heir, or affect the lands which may have descended to him. Whence it appears, that, in some instances, at common law, a creditor might be in a better situation before than after he had obtained a judgment against his debtor. *Davy* v. *Pepys*, *Plow.* 439; *Sir William Harbert's Case*, 3 *Co.* 12; *Drake* v. *Mitchell*, 3 *East*, 258; *Kinaston* v. *Clark*, 2 *Atk.* 204; *Galton* v. *Hancock*, 2 *Atk.* 428; *Stileman* v. *Ashdown*, 2 *Atk.* 609; *Powel Mortg.* 598, 777.

In all cases, at the common law, if the party who should be
302 *charged had aliened the land, *bona fide*, before any action brought the land in the hands of the purchaser was not subject to any charge or execution. A bond is not properly an incumbrance upon land; for it does not follow the land like a judgment. But if an action of debt be brought against the heir upon the obligation of his ancestor, and the heir aliens the land pending the suit; yet shall the land, which he had at the institution of the suit, be charged; because, the action was brought against him in respect of the land. Hence it appears, that the common law lien of a bond creditor as against the heir, relates to the institution of the suit and fastens on the land from that time. Consequently, where there were two creditors, A. and B. of J. S. whose heir was bound, and who had lands by descent. And A. brought suit and obtained judgment by default on the first of March, 1686, upon which he issued a general *elegit* against all the lands of the heir, a